IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-771

JOHN F. QUINN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OSCAR B. GOODMAN, ESQ.
GOODMAN, OSHINS, BROWN & SINGER, CHARTERED
1600 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563
Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. THE PROJECTIONS USED IN THIS CASE BY THE GOVERNMENT WERE ARBITRARY, CAPRICIOUS AND WITHOUT FOUNDATION IN FACT	6
CONCLUSION	9
CERTIFICATE OF SERVICE	9
APPENDIX A	1a

TABLE OF AUTHORITIES

Cases:	*Page*
Helvering v. Taylor, 293 U.S. 507 (1935)	6
Lucia v. United States, 474 F.2d 565 (5th Cir., 1973)	6
Pizzarello v. United States, 408 F.2d 579 (2nd Cir., 1969)	7,8
Welch v. Commissioner, 297 F.2d 565 (5th Cir., 1973)	6
Statutes:	
18 U.S.C. §1001	3
28 U.S.C. §1254(1)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

JOHN F. QUINN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, JOHN F. QUINN, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 15, 1978. A Petition for Rehearing and a Suggestion for Rehearing En Banc was denied on October 10, 1978.

OPINION BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit, not yet reported, appear in the Appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals was correct in allowing the Government to use projections supplied by the Internal Revenue Service which were arbitrary, capricious and without foundation in fact.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner respectfully submits that constitutional issues of law are specifically at issue herein. The constitutional question involved is whether the Government may utilize in its case projections by the Internal Revenue Service which are arbitrary, capricious and without foundation in fact in violation of a taxpayer's due process and equal protection rights.

STATEMENT OF THE CASE

Petitioner, JOHN F. QUINN, entered into the book-making business in Omaha, Nebraska during the year 1951. His activities in this business continued from 1951 through 1964. From January of 1955 until August of 1961, the Petitioner timely filed wagering excise tax returns with the

District Director of the Internal Revenue Service in Omaha, Nebraska, reflecting his wagering activities for these specific periods.

During the year 1958, Petitioner was contacted by the Internal Revenue Service for an audit of his tax returns for the years 1955, 1956 and 1957 and was requested to present his wagering tax records for examination by the Internal Revenue Service. Petitioner contacted an attorney to discuss this pending audit. After a review of Petitioner's records by this attorney, he was advised that the records that QUINN had in his possession were not acceptable by the Internal Revenue Service because they only showed the date and the gross wagers accepted by Petitioner. Petitioner was further advised to prepare more elaborate records showing specific events wagered upon and amounts involved in those wagers. In compliance with this advice, Petitioner prepared false records, attempting to comply with what he believed to be the record requirements of the Internal Revenue Service.

These false records were delivered to the Internal Revenue Service and Petitioner was subsequently indicted under 18 U.S.C. §1001 for giving false records to a federal officer. Petitioner pled guilty to that offense and was placed on probation.

In 1967, the Internal Revenue Service, using the false records submitted by Petitioner and some other minor third party information, projected wagering tax assessments against the Petitioner in substantial amounts.

In 1972, Petitioner filed separate claims for refund and abatement of the taxes for each of the 77 monthly taxable periods involved in the assessments. A partial payment accompanied each claim for refund. These claims for

refunds were disallowed and Petitioner filed his suit for refund which is the subject matter of this Petition for Certiorari.

At the trial of this case, Petitioner testified extensively regarding his bookmaking activities between 1955 and 1961. He carefully and clearly outlined to the Court the type of records that he kept to prepare his federal wagering excise tax returns and concluded his testimony by stating that the forms he filed accurately reflected all the wagers placed with him during the covered periods. In opposition to this testimony, the Government presented its projections for the period under review and the basis for said projections. There were two separate projection approaches used for the periods in question.

The projections which form the basis for the assessments for 1955 through 1957 were prepared by an agent by first using the false records submitted by QUINN. Based upon this projection, the Internal Revenue Service determined that Petitioner averaged approximately $773.00 per day in horse racing bets accepted. These admitted false records which were fabricated by QUINN based on erroneous legal advice were used by the Internal Revenue Service to determine the extent of Petitioner's under reporting of horse racing bets for the monthly periods of January, 1955 through December of 1957. The Internal Revenue Service next estimated that Petitioner accepted certain amounts of wagers on football and baseball on a daily basis. Upon cross-examination, the Internal Revenue Service involved admitted that the Government had no proof that Petitioner was even involved in receiving any wagers for baseball or football during the years 1955 through 1957.

The second projection which was used for the basis of assessments from 1958 through 1971 was, based upon the

testimony of Internal Revenue Service agents, based solely on statements and telephone records submitted by Internal Revenue Service special agents. Further, the information used to make this projection was based solely on information received regarding Petitioner for part of the years 1960 and 1961. The Internal Revenue Service used this information to project backwards to 1958 and 1959. The Internal Revenue Service agent auditing Petitioner's returns admitted that he did not consider the records and returns filed by Mr. QUINN in arriving at his projections.

The District Court after hearing the evidence in this case dismissed Petitioner's action with prejudice and granted the Government's counterclaim in the amount of $286,371.82 plus interest.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's findings and found that the false records submitted by Petitioner were a true and accurate record of wagering activities during an 80 day period of a year other than the year under audit. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the United States Court of Appeals for the Ninth Circuit on October 10, 1978.

REASON FOR GRANTING THE WRIT

I.

THE PROJECTIONS USED IN THIS CASE BY THE GOVERNMENT WERE ARBITRARY, CAPRICIOUS AND WITHOUT FOUNDATION IN FACT.

The tax assessment against Petitioner which covers a period of 77 months is based upon projections which are arbitrary, capricious and without foundation in fact. Such assessments made by the Internal Revenue Service have consistently been held to be invalid and are not to be accorded the usual presumption of correctness. Further, if the determination has no rational foundation and is not based upon assumptions which can be supported, the taxpayer has no burden of proving the correct amount of tax due and owing. *Helvering v. Taylor*, 293 U.S. 507 (1935) and *Welch v. Commissioner*, 297 F.2d 309 (4th Cir., 1961).

In *Lucia v. United States*, 474 F.2d 565 (5th Cir., 1973), the Court remanded the case to the District Court to determine whether the Government could make a sufficient showing to support its assessment of wagering excise taxes. Among the Court's directions was to ask the Lower Court to determine whether or not the Government's figures were based on realistic projections or merely derived, mandrake-like, from a filament of evidence and subjected to a slight of hand computation. The Court, on page 575, footnote 42, in discussing the use of projections indicated that the failure of the taxpayer to keep records in light of self-incrimination problems will not bar the taxpayer from overcoming an

assessment that is arbitrary and capricious:

> "Although Pinder partially rationalized the use of the projection method on the ground that the taxpayer failed to keep records required by §4403 and §4423, a rational probably abrogated by Marchetti and Grosso, Pinder is not authority for defending a projection that is arbitrary, capricious and without factual foundation."

Pizzarello v. United States, 408 F.2d 579 (2nd Cir., 1969) is a similar case which the Court seriously questioned the use by the Government of projections and estimations based upon limited records. Its concern was eloquently expressed on page 584 of the decision:

> "Moreover, while we recognize the difficulties faced treasury agents and the need to estimate in situations of this nature, wagers received on three consecutive days can hardly be said to be representative of wagers received over a five year period, even assuming Pizzarello accepted wagers for as long as the Government contends."

A close look at the method of computation employed by the Government in this case shows clearly and convincingly that the methods are arbitrary, capricious and without factual foundation. The methods in fact do not even rise near the evidence available in *Pizzarello, supra* which was rejected by the Circuit Court. For the period between January, 1955 and December, 1957, the Internal Revenue Service admitted that the basic source for their additional assessment was the use of the false records submitted by Petitioner. The Internal Revenue Service admitted that they knew that these records were false in that they represented 1957 horse racing results but were purported to be for 1955 and 1956. In fact, under cross-examination, the Internal Revenue Service agent handling the matter admitted that

the records were incorrect but that he assumed for projection periods that they were the Petitioner's records for 1957. The Internal Revenue Service used these false records which Petitioner admits were fabricated and picked out of random to project horse racing activity for a three year period. At this point, we have the Government admitting that their projections were based upon fictitious records. Under *Pizzarello*, the Court seriously questioned the use by the Government of projections and estimates based on limited records of the taxpayers. In this case, we have the Government using records that are false and in effect no records at all to make arbitrary and capricious projections. The balance of the 1955 through 1957 projections involve football and baseball wagers and were in fact admitted by the Internal Revenue Service to be based upon mere supposition and not based upon any records at all.

If ever there was a case in which the Internal Revenue Service's determination was arbitrary, capricious and unreasonable it would be this case. Projections using admittedly false and inaccurate records along with mere assumptions as to other gambling activities must be found by any court to be invalid and unenforceable. To allow the Government to base a case and present this evidence as part of its case certainly violates the due process and equal protection rights that a taxpayer has under the constitutional protections of this country.

CONCLUSION

For the reasons stated, a Writ of Certiorari should issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted:

OSCAR B. GOODMAN, ESQ.
GOODMAN, OSHINS,
BROWN & SINGER,
CHARTERED
1600 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384- 5563
Counsel for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed this 16th day of November, 1978, postage prepaid, to the Honorable Wade H. McCree, Jr., Solicitor General, United States Department of Justice, Washington, D.C. 20530.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN F. QUINN,	)	No. 76-1430
	)	ORDER
Plaintiff-Appellant,	)	DENYING
	)	PETITION
vs.	)	FOR
	)	REHEARING
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: CHAMBERS, KILKENNY and TANG, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 15(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN F. QUINN,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 76-1430

MEMORANDUM AFFIRMING

Appeal from the United States District Court for the District of Nevada

Before: CHAMBERS, KILKENNY and TANG, Circuit Judges.

The taxpayer appeals from a judgment dismissing his suit for refund of wagering taxes paid and granting the government the full amount of its counterclaim. We affirm.

From January 1, 1955 through August 31, 1961, Quinn accepted wagers on horse races and other sporting events in Nebraska. Internal revenue agents audited Quinn's income tax returns for 1955 and 1956. They asked Quinn to furnish records substantiating his deductions from wagering income. In an attempt to comply, Quinn submitted false documents to the agents. He pleaded guilty to that charge in 1961. Agents determined that these documents represented Quinn's wagering activity during an 80-day period in 1957 rather

than his activity in 1955 and 1956. Using this information, agents projected Quinn's gross wagering receipts for the period from January 1, 1955 until August 31, 1961. The Commissioner determined that Quinn had substantially underrepresented his wagering income on his required tax returns and assessed a deficiency. Quinn filed separate claims for refund, including with each claim $10 as a partial payment of the proposed deficiency. He brought suit after the Commissioner denied his refund claim.[1] The district court dismissed his suit, granting the government's counterclaim for the balance of the assessment. Quinn appeals.

Quinn argues that the tax assessment lacked a factual foundation. He maintains that the Commissioner could not rely on the documents he submitted because they were admittedly false. We disagree. The district court found that the documents painted a clear picture of Quinn's wagering activity for an 80-day period. The record supports this finding. In addition to testimony from the agents who prepared the estimate, the court heard testimony from employees and a client of Quinn's. The estimate is "rationally based and presumptively correct." *Avery v. Commissioner,* 574 F.2d 467, 468 (9th Cir. 1978). Quinn presented no evidence to overcome the presumption.

Quinn also contends that the government failed to establish fraud. Therefore, the assessments are barred by the

[1]As a general rule, a district court has jurisdiction of a suit for refund only if the taxpayer has paid the full assessment, 28 U.S.C. §1346(a)(1). Excise tax deficiencies, however, are divisible into a tax on each transaction or event. *Flora v. United States,* 362 U.S. 145, 171 n. 37, 175 n. 38 (1960); *Boynton v. United States,* 566 F.2d 50 (9th Cir. 1977). The partial payments represented the tax due on at least one wager during each month. The district court had jurisdiction. *Higginbotham v. United States,* 556 F.2d 1173, 1174 n. 1 (4th Cir. 1977).

statute of limitations. The district court concluded that Quinn had committed fraud, finding that he failed to maintain adequate records, consistently understated his gross receipts from wagers, and admittedly filed false and misleading statements with the IRS. The record supports the district court.

AFFIRMED.